

I. NEEL CHATTERJEE (State Bar No. 173985)
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, CA 94025
Telephone: 650-614-7400
Facsimile: 650-614-7401

JAMES N. KRAMER (State Bar No. 154709)
CHRISTIAN N. BROWN (State Bar No. 233147)
ORRICK, HERRINGTON & SUTCLIFFE LLP
The Orrick Building
405 Howard Street
San Francisco, CA 94105
Telephone: 415-773-5700
Facsimile: 415-773-5759

Attorneys for Plaintiff
DUKE ADVANTAGE, LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DUKE ADVANTAGE, LLC, a company,

Plaintiff,

v.

CORMATRIX CARDIOVASCULAR, INC.,
a corporation, ROBERT G. MATHENY, an
individual, DAVID B. CAMP, an individual,
and BEECHER LEWIS, an individual,

Defendants.

CASE NO. C-07-2950 RMW

Santa Clara Superior Court
Case No. 107 CV085326

**DEFENDANT DUKE ADVANTAGE,
LLC'S MEMORANDUM OF POINTS
AND AUTHORITIES IN
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS**

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1 **I. INTRODUCTION**

2 Plaintiff Duke Advantage, LLC (“Duke Advantage”) chose to file the present action
3 against Defendants CorMatrix Cardiovascular, Inc. (“CorMatrix”), Robert Matheny, David
4 Camp, and Beecher Lewis (collectively “Defendants”) in California because the forum-selection
5 clause violates strong California public policy requiring application of the state’s own securities
6 laws to cases alleging improper sales to California residents. The forum selection clause and
7 choice of law provision appearing in the stock purchase agreement between the parties are
8 unreasonable and void, because their joint operation would effectively deprive Duke Advantage
9 of non-waivable protections afforded by California law. California’s securities law contains an
10 express anti-waiver provision that declares void any agreements that would subvert its application
11 in a case involving sales of securities to a California resident. Defendants solicited a California
12 resident to purchase securities and made fraudulent representations in connection with that sale.
13 Under established California law, this action should be heard here.

14 In addition, CorMatrix’s purported forum selection clause can be disregarded under the
15 circumstances of this case. For example, the stock purchase agreement’s forum selection clause
16 conflicts with the forum selection clause found in the Stockholders Agreement governing Duke
17 Advantage’s rights and duties as an owner of CorMatrix stock. Both conflicting forum clauses
18 are mandatory in nature, and both are accompanied by similarly inconsistent choice of law
19 provisions. Such conflicting provisions indicate a lack of agreement, create confusion, and
20 frustrate the policy behind enforcement of forum selection clauses, as the appropriate forum is
21 entirely in question. The Northern District should retain jurisdiction over this dispute in light of
22 the parties’ connections to this state, the transaction giving rise to the dispute having been
23 executed in California, and because the plaintiff reasonably (and consistently with California law
24 and policy) chose to file suit in this state.

25 **II. FACTUAL BACKGROUND**

26 **A. Defendants Sold Securities to Duke Advantage in California**

27 Plaintiff Duke Advantage, LLC (“Duke Advantage”) is a limited liability company with
28 its principal place of business located in Santa Cruz, California. LaDuca is a member of Duke

1 Advantage, and is an inventor in the field of medical device development. Declaration of Robert
2 LaDuca in Support of Plaintiff Duke Advantage's Opposition to Defendants' Motion to Dismiss
3 ("LaDuca Decl.") ¶ 3.

4 In June of 2003, LaDuca met with Robert G. Matheny ("Matheny"), the founder and Chief
5 Scientific Officer of Defendant CorMatrix, in San Francisco. LaDuca and Matheny discussed the
6 technology CorMatrix was developing, and LaDuca offered suggestions for possible uses of
7 CorMatrix's technology, including its potential for use as a covering on a medical stent grafts and
8 other medical devices. In February of 2004, CorMatrix was in need of additional investment, and
9 contacted LaDuca in Santa Cruz, California via telephone to inquire whether LaDuca was
10 interested in purchasing shares of CorMatrix stock. After expressing interest, LaDuca negotiated
11 the terms of an investment with Matheny and other CorMatrix executives via telephone, email
12 and facsimile from his residence and office in Santa Cruz. LaDuca Decl. ¶ 4.

13 Ultimately, the parties agreed that in exchange for a \$350,000 investment in CorMatrix,
14 CorMatrix would cause 25,161 shares of its common stock to be issued to the Plaintiff Duke
15 Advantage, and Duke Advantage would be provided with representation on CorMatrix's Board of
16 Directors and an active role in overseeing the company's strategy and operations. As alleged in
17 the Complaint, Defendants made the promise of a seat on the company's board and an active role
18 in the company knowing it to be false, with the intention of inducing Duke Advantage to make its
19 investment. Since making its sizeable investment, Duke Advantage's member LaDuca has never
20 been invited to attend any board meetings. When it became clear that the Defendants had not
21 lived up to that promise, and subsequently took a litigious stance towards LaDuca, Duke
22 Advantage filed the present Complaint. LaDuca Decl. ¶ 5.

23 **B. The Subscription Agreement**

24 In connection with Duke Advantage's investment, on February 9, 2004 CorMatrix
25 CFO John Thomas ("Thomas") faxed LaDuca a stock purchase agreement (the "Subscription
26 Agreement"). The Subscription Agreement governs the terms of the sale of CorMatrix stock,
27 memorializes the transaction, and provides the representations and warranties in connection the
28 sale. Section 4.2 of the Subscription Agreement is entitled "Governing Law; Jurisdiction." It

1 states:

2 (A) THIS SUBSCRIPTION AGREEMENT SHALL BE
3 GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH
4 THE INTERNAL LAWS OF THE STATE OF GEORGIA
WITHOUT REGARD TO ITS CONFLICT OF LAWS
PRINCIPLES,

5 (B) THE UNDERSIGNED HEREBY IRREVOCABLY
6 SUBMITS TO THE JURISDICTION OF ANY GEORGIA STATE
7 COURT OR UNITED STATES FEDERAL COURT SITTING IN
8 THE STATE OF DELAWARE, OVER ANY ACTION OR
PROCEEDING ARISING OUT OF OR RELATING TO THIS
SUBSCRIPTION AGREEMENT OR ANY AGREEMENT
CONTEMPLATED HEREBY, AND

9 (C) THE UNDERSIGNED HEREBY IRREVOCABLY
10 AGREES THAT ALL CLAIMS IN RESPECT OF SUCH
11 ACTION OR PROCEEDING SHALL BE HEARD AND
12 DETERMINED IN SUCH GEORGIA STATE COURT OR
13 FEDERAL COURT. THE UNDERSIGNED FURTHER WAIVES
14 ANY OBJECTION TO VENUE IN SUCH COURT AND ANY
OBJECTION TO AN ACTION OR PROCEEDING IN SUCH
COURT ON THE BASIS OF A NON-CONVENIENT FORUM.
THE UNDERSIGNED FURTHER AGREES THAT ANY
ACTION OR PROCEEDING BROUGHT AGAINST THE
COMPANY SHALL BE BROUGHT IN SUCH COURTS.

15 LaDuca Decl., Ex. A, § 4.2 of the Subscription Agreement. Subsection 4.2(A) of the
16 Subscription Agreement thus contains a mandatory choice of law provision instructing that
17 Georgia law shall apply without reference to choice of law principles, while subsection 4.2(C)
18 contains the choice of forum provision Defendants seek to enforce. *Id.*

19 **C. The Stockholders Agreement**

20 In connection with Duke Advantage's purchase of CorMatrix stock, Duke
21 Advantage became a party to a stockholder's agreement with CorMatrix ("Stockholders
22 Agreement"), which the Defendants' originally made with Purdue Research Foundation, Inc. and
23 which binds subsequent purchasers of CorMatrix stock. LaDuca Decl., Ex. B. At the time
24 Thomas faxed the Subscription Agreement to Duke Advantage on February 9, 2004, it appears
25 that he meant to include with it a copy of the Stockholders Agreement, but inadvertently sent a
26 stock purchase agreement between Purdue Research Foundation, Inc. and CorMatrix. LaDuca
27 Decl., ¶6, Ex. A. On the cover sheet of the February 9, 2004 fax, Thomas wrote, "[a]lso attached
28 is the stockholders agreement related to Purdue which you by becoming a shareholder of

1 CorMatrix become a party to as well.” LaDuca Decl., ¶ 6, Ex. A. Thomas sent the Stockholders
 2 Agreement to Duke Advantage’s counsel, Linsey White, the next day on February 10, 2004.
 3 LaDuca Decl. ¶ 7, Ex. B.

4 By its own terms, as well as the admission of CorMatrix’s CFO in the cover sheet
 5 of the February 9, 2004 fax cover sheet, the Stockholders Agreement is binding upon the Plaintiff
 6 Duke Advantage as a purchaser of CorMatrix stock. The Stockholders Agreement provides for
 7 the rights, duties and responsibilities of holders of CorMatrix stock, and CorMatrix as the issuer
 8 of that stock, with respect to ownership, transfer and other actions. The introduction to the
 9 Stockholder’s Agreement states:

10 This Stockholders Agreement (this “Agreement”) is made on
 11 November 16, 2001, by and among CorMatrix Cardiovascular, a
 12 Georgia corporation, with its principal offices located at 14980 East
 13 Bluff Road, Alpharetta, Georgia 30004 (“Licensee”), Purdue
 14 Research Foundation, Inc., an Indiana nonprofit corporation with
 15 offices located at 1291 Cumberland Avenue, West Lafayette,
 16 Indiana (“PRF”), the persons designated as Additional Investors in
 17 Schedule A (“the Additional Investors”) and the individuals
 designated as Founding Stockholders in Schedule A (“the Founding
 Stockholders”) (PRF, the Additional Investors and the Founding
 Stockholders, **together with any other person or entity which
 may become a stockholder of the Licensee hereafter are, for so
 long as they are stockholders of Licensee, collectively referred
 to in this Agreement as the “Stockholders” or individual
 “Stockholder.”**)

18 LaDuca Decl., Ex. B (emphasis added). In addition, Section 5.5 of the Stockholders Agreement
 19 is entitled “Subsequent Stockholders to Become Bound.” It states in part:

20 Any person or entity who subsequently becomes a Stockholder of
 21 License (including holders of options or warrants to acquire
 22 common stock upon the exercise of such option or warrant, as the
 case may be) shall be bound by all the terms and provisions of, and
 shall be entitled to all the benefits and privileges of this Agreement.

23 *Id.* The agreement goes on to set forth the limited rights of “Stockholders,” such as Duke
 24 Advantage to sell, transfer and otherwise dispose of their shares. *See Id.* at Articles 2-4.

25 The Stockholders Agreement also contains choice of law and forum provisions
 26 that conflict with those found in the Subscription Agreement. Section 5.8 of the Stockholders
 27 Agreement, entitled “Governing Law and Jurisdiction,” states:

28 This Agreement shall be governed by and interpreted under the

1 laws of the State of Indiana, without giving effect to the principles
2 of conflicts of law of any jurisdiction. In the event that a party to
3 this Agreement perceives the existence of a dispute with the other
4 party concerning any right or duty provided for in this Agreement,
5 the parties will, as soon as practicable, confer in an attempt to
6 resolve the dispute. If the parties are unable to resolve the dispute
7 amicably, then the parties hereby submit to the exclusive
8 jurisdiction of and venue in the state and federal courts located in
9 Tippecanoe County, Indiana with respect to any and all disputes
10 concerning the subject, or arising out, of this Agreement, and such
11 courts shall have sole and exclusive jurisdiction and venue over
12 such disputes.

13 *Id.* at § 5.8.

14 **D. Defendants Have Extensive Ties to This Forum**

15 In addition to selling securities within California, which specifically gave rise to
16 the present dispute between the parties, Defendants have extensive contacts with California.
17 CorMatrix maintains both operations and an office in Sunnyvale, California. The California
18 address for this facility is the only one currently listed on CorMatrix's website at <http://www.cormatrix.com>, indicating the strong likelihood that Sunnyvale, California represents CorMatrix's
19 principal place of business. Before moving to its Sunnyvale facility, CorMatrix ran its operations
20 out of facilities in Santa Cruz, California. The individual defendants traveled approximately six
21 times each year to California to solicit additional investors, attend conferences, observe
22 CorMatrix's operations, meet with medical professionals, and promote CorMatrix's products.
23 LaDuca Decl., ¶ 8.

24 In contrast, Defendants' only ties to Georgia are that CorMatrix is incorporated
25 there, and two of the three individually named executives of CorMatrix live in Georgia. In fact,
26 the corporate address of CorMatrix is the home address for CorMatrix's CEO, David Camp.
27 LaDuca is unaware that CorMatrix has any employees in Georgia. LaDuca Decl., ¶ 9.

28 Duke Advantage has no significant ties or contacts with Georgia other than
through its investment in CorMatrix, which was solicited in California. LaDuca has only been to
Georgia twice in connection with Duke Advantage business, once to attend a Shareholders
Meeting in late 2006, and again after this litigation commenced to attend another Shareholder's
Meeting in late June of this year. Duke Advantage does not carry out any activities in Georgia,

1 and LaDuca has no plans to be in Georgia again in the future in connection with any Duke
 2 Advantage business. LaDuca Decl. ¶ 10

3 **III. ARGUMENT**

4 **A. Legal Standard**

5 In ruling on a Rule 12(b)(3) motion, the court must draw all reasonable inferences
 6 and resolve all factual conflicts in favor of the party seeking to avoid enforcement of the clause.
 7 *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1138 (9th Cir. 2004). In the Ninth Circuit,
 8 federal law applies to forum selection clauses. *Manetti-Farrow, Inc.* 858 F.2d at 513.
 9 Additionally, "because the enforcement of a forum clause necessarily entails interpretation of the
 10 clause before it can be enforced, federal law also applies to interpretation of forum selection
 11 clauses." *Id.*

12 A forum selection clause is "prima facie valid and should be enforced unless
 13 enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *The*
 14 *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972). Enforcement is "unreasonable" where it
 15 would "contravene a strong public policy of the forum in which suit is brought, whether declared
 16 by statute or by judicial decision." *Id.* at 15. While the procedure in federal court is less clear,
 17 once a party seeking to avoid enforcement of a forum selection clause asserts that public policy
 18 expressed in a statutory scheme prohibits the parties from choosing a non-California forum and
 19 waiving California law, the burden is on the defendant to show that litigation in the contract
 20 forum will not diminish any of the plaintiff's rights under California law. *Wimsatt v. Beverly*
 21 *Hills Weight Loss Clinics Int'l Inc.*, 32 Cal.App.4th 1511, 1523 (1995).

22 **B. The Forum Selection Clause Defendants Seek to Enforce is Void Under** 23 **California Law. As a Result, There is No Valid Agreement for the Court to** 24 **Enforce**

25 The California state legislature has enacted an anti-waiver provision of the state's
 26 securities laws codified in California Corporations Code Section 25701, mandating that any
 27 agreement that would result in the evasion of California's securities laws are null and void.
 28 Corporations Code Section 25701 provides that "[a]ny condition, stipulation or provision
 purporting to bind any person acquiring any security to waive compliance with any provision of

1 this law or any rule or order hereunder is void.” Cal. Corp. Code § 25701.

2 Here, the joint operation of the choice of forum and choice of law clauses that
3 Defendants seek to enforce would effectively deprive California of the ability to regulate the
4 Defendants’ improper sale of securities within this state, and deny Duke Advantage the
5 protections afforded by California law. The choice of forum and choice of law provisions in the
6 Subscription Agreement mandate that cases be heard in a Georgia state or Delaware federal court
7 applying Georgia law without reference to choice of law principles. Defendants argue that
8 “[b]ecause all of Plaintiffs claims are intertwined with its investment in CorMatrix, the Court will
9 have to interpret and analyze the Subscription Agreement to determine whether the causes of
10 action are applicable to any of the defendants.” Defendants’ Memorandum of Points and
11 Authorities in Support of Motion to Dismiss for Improper Venue, at 9:4-6. By Defendants own
12 logic and the terms of the choice of law provision in the Subscription Agreement, were this action
13 brought in a Georgia or Delaware court, that court would be powerless to apply California law to
14 a dispute over the sale of securities in that state. Such a contractual restriction violates California
15 law.

16 In *Hall v. Superior Court*, 150 Cal. App.3d 411 (1983), the California Court of
17 Appeals dealt with a similar situation. The court refused to enforce a forum selection clause and
18 accompanying choice of law provision because it held that the provisions violated the anti-waiver
19 provisions of Corporations Code Section 25701 and the state’s public policy of protection of
20 securities investors and potential evasion of California securities law. As in this case, the
21 defendants in *Hall* negotiated and sold securities within this state, and obtained an agreement
22 from the plaintiff to litigate any related disputes in an out-of-court state applying non-California
23 law. The court held that “[b]ecause the choice of law provision in the same agreement violates
24 the Corporations Code and the public policy of this state, we hold enforcement of the choice of
25 forum provision is unreasonable.” *Hall*, 150 Cal.App.3d at 413. The court explained that
26 “Section 25701 applies where there is an offer to sell or buy securities in California,” and held
27 that:

28 California’s policy to protect securities investors, without more,

would probably justify denial of enforcement of the choice of forum provision, although a failure to do so might not constitute an abuse of discretion; but [California Corporations Code] Section 25701, which renders void any provision purporting to waive or evade the Corporate Securities Law, removes that discretion and compels denial of enforcement.

Hall, 150 Cal.App.3d at 417; 418. While this Court is not bound by California procedural law, the *Hall* case illustrates that as a matter of substantive law the choice of forum clause Defendants' seek to enforce was void under Corporations Code 25701 *ab initio*. As such, there is no valid agreement for the Court to enforce, and Defendants' motion must be denied.

C. Enforcing the Forum Selection Clause in the Subscription Agreement would Violate Strong California Public Policy Favoring Application of The State's Laws to Protect California Purchasers of Securities

Enforcement of the forum selection and choice of law provisions in the Subscription Agreement would also violate strong California public policy, and render enforcement of the clause "unreasonable" under the factors elucidated in *The Bremen*. California has a strong public policy favoring application of its securities laws to cases involving the sale or purchase of securities within its borders. *Hall*, 150 Cal. App.3d at 417 ("California's policy is to protect the public from fraud and deception in securities transactions").¹ California's Corporate Securities Law of 1968 "was enacted to effectuate this policy by regulating securities transactions in California and providing statutory remedies for violations of the Corporate Code, in addition to those available under common law." *Id.* The protections afforded to California residents by the Corporate Securities Law of 1968 extend to limited liability companies such as Duke Advantage, as well as natural persons. Cal. Corp. Code § 25013 ("[p]ersons' means an individual, a corporation, a partnership, a limited liability company . . .").

An anti-waiver provision expressing the state's public policy was also at issue in *Jones v. GNC Franchising, Inc.*, 211 F.3d 495 (9th Cir. 2000). In *Jones*, the Ninth Circuit upheld the trial court's refusal to enforce a forum selection clause on the grounds that enforcement would contravene California's strong public policy against enforcing such clauses in franchise agreements. The court held that the state's public policy was expressed in a statutory anti-waiver

¹ *Hall* has been cited with approval by the Supreme Court of California in the seminal case *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal.4th 459, 464 (1992).

1 provision, explaining that California Business and Professions Code Section 20040.5 (which
2 voids forum selection clauses involving franchise businesses operating within the state)
3 “expresses a strong public policy of the state of California to protect California franchisees from
4 the expense, inconvenience, and possible prejudice of litigating in a non-California venue.”
5 *Jones*, 211 F.3d at 498. Here, Corporations Code Section 25701 expresses a similarly strong
6 public policy to protect California residents by ensuring application of “California law and its
7 concomitant nuances” to any disputes arising out of the purchase or sale of securities within the
8 state. *Hall*, 150 Cal.App.3d at 418.

9 The undisputed facts indicate that an offer to sell and an actual sale of securities
10 was made by the Defendants within this state. Defendants offered securities and negotiated for
11 their sale via interstate phone calls to California, and the securities were delivered to Duke
12 Advantage in California. *See* Cal. Corp. Code § 25008(b) (defining what constitutes an offer of
13 sale and sale within the meaning of the Corporate Securities Law of 1968). Duke Advantage now
14 alleges fraud in connection with that sale. Should the choice of forum and choice of law
15 provisions found in Section 4.2 of the parties’ Subscription Agreement be enforced, Duke
16 Advantage could effectively be deprived of substantive rights under California law that the state
17 legislature has declared cannot be waived. Via enactment of an anti-waiver statute, California has
18 “declared by statute” its strong public policy of protecting California purchasers of securities
19 through application of California law despite agreements such as the forum selection provision at
20 issue here. *See The Bremen*, 407 U.S. at 15. As set forth in Corporations Code Section 25701, a
21 seller of securities cannot avoid California law by agreeing with a purchaser to litigate in out-of-
22 state courts applying non-California law. While Duke Advantage has not yet stated claims under
23 California’s Corporate Securities Law of 1968, it has plead facts sufficient to state a claim under
24 Section 25400(d) of that law. *See* Complaint at ¶¶ 19-36. Enforcement of the choice of law and
25 choice of forum clauses at issue would deprive Duke Advantage of the ability to amend its
26 complaint to state such a claim, as is liberally permitted by the Federal Rules of Civil Procedure.
27 In addition, California Corporations Code Section 25701 and the public policy it reflects takes
28 effect prior to the initiation of any litigation, before any claims are made, at the time a potentially

1 violating agreement is created.

2 Because "a contractual choice of forum clause should be held unenforceable if
3 enforcement would contravene a strong public policy of the forum in which suit is brought," the
4 Court should refrain from enforcing the clause at issue here. *The Bremen*, 407 U.S. at 15.

5 **D. The Policy Behind Enforcement of Forum Selection Clauses is Frustrated by**
6 **Conflicting Forum Selection Clauses**

7 Forum selection clauses should provide parties to a contract with a measure of
8 orderliness and predictability. As the Supreme Court stated in *Carnival Cruise Lines, Inc v.*
9 *Shute*, 499 U.S. 585, 594 (1991), "[a] clause establishing *ex ante* the forum for dispute resolution
10 has the salutary effect of dispelling any confusion about where suits arising from the contract
11 must be brought and defended." Here, the existence of conflicting choice of forum and choice of
12 law provisions in separate agreements exacerbates, rather than dispels, such confusion. Indeed,
13 the objectives of the provisions themselves are utterly unclear.

14 The two agreements set forth three different forums and two different sets of
15 governing law, creating a confusing mix of jurisdictional considerations. Section 4.2 of the
16 Subscription Agreement contains choice of law and forum provisions requiring that any action
17 arising out of or related to the agreement be brought in Georgia state or Delaware federal court,
18 applying Georgia law. Section 5.8 of the Stockholders Agreement, however, provides that
19 disputes between parties to the agreement (which by virtue of Section 5.5 includes Duke
20 Advantage) must be brought in Indiana state or federal courts, applying Indiana law. Duke
21 Advantage has made claims that implicate both agreements, namely breach of fiduciary duty and
22 accounting inspection claims involving the rights of a stockholder, as well as claim for fraudulent
23 inducement to purchase securities. Both agreements are thus related to Duke Advantage's
24 investment in CorMatrix and status as a CorMatrix stockholder. Both forum selection provisions
25 use mandatory and exclusive language and, by their own admission, the Defendants have
26 acknowledged that both agreements are binding upon Duke Advantage. In the face of competing
27 and contradictory forum selection clauses, the public policy behind enforcement of such clauses
28 is frustrated. Faced with the confusion created by these contradictory provisions, the Court

1 should default to the plaintiff's choice of forum. *See Ravelo Monegro v. Rosa*, 211 F.3d 509, 513
2 (9th Cir. 2000) (noting in general the strong presumption in favor of a plaintiff's forum choice).

3 **E. Venue is Proper in the Northern District of California**

4 Venue in this forum is proper because the parties have strong ties to this forum,
5 and the actions giving rise to the present dispute largely took place within the Northern District of
6 California. The transaction giving rise to the present dispute occurred in California. And as set
7 forth in Section II, the Defendants have extensive ties to California.

8 **IV. CONCLUSION**

9 For the foregoing reasons, Plaintiff Duke Advantage respectfully requests that the Court
10 deny Defendants' Motion to Dismiss.

11
12 Dated: July 13, 2007

ORRICK, HERRINGTON & SUTCLIFFE LLP

13
14 /s/ Christian N. Brown

15 Christian N. Brown
16 Attorneys for Plaintiff
DUKE ADVANTAGE, LLC